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Recent Cases

LABOR LAW—JURISDICTION OF NATIONAL LABOR RELATIONS BOARD—NATIONAL LABOR RELATIONS BOARD DENIED JURISDICTION OVER LAY FACULTY OF PAROCHIAL SCHOOLS. *National Labor Relations Board v. Catholic Bishop of Chicago*, 99 S. Ct. 1313 (1979).

In *NLRB v. Catholic Bishop of Chicago,*[1] a divided[2] United States Supreme Court held that the National Labor Relations Act[3] does not authorize the National Labor Relations Board to exercise jurisdiction over the lay faculty of church-operated schools that teach both religious and secular subjects.[4] In reaching its decision, the Court asserted that it would not construe the Act in a manner that could require a resolution of difficult and sensitive first amendment questions in the absence of "an affirmative intention of the Congress clearly expressed."[5] *Catholic Bishop* represents an exception to the long line of Supreme Court decisions holding that the statutory jurisdiction of the Board is coextensive with congressional power to legislate under the commerce clause of the Constitution.[6]

The Catholic Bishop of Chicago, a corporation sole,[7] operates two secondary schools. The schools were termed "minor seminaries" because admission was limited to boys with a positive desire to be priests.[8] In 1970, however, the Archbishop broadened the admission policy to include all students "recommended by their parish priest as having a potential for the priesthood or for Christian leadership."[9] The Board characterized the schools as essentially college preparatory since only a small percentage of the students entered the seminary.[10] The academic curriculum and the extracurricular activi-

1. 99 S. Ct. 1313 (1979).

2. Chief Justice Burger delivered the opinion of the Court, joined by Justices Stewart, Powell, Rehnquist, and Stevens. Justice Brennan filed a dissenting opinion in which Justices White, Marshall, and Blackmun joined.

3. 29 U.S.C. §§ 141-44, 151-87 (1976).

4. 99 S. Ct. at 1322.

5. *Id.* at 1319.

6. *See* note 79 *infra.*

7. "A corporation sole is . . . [a corporation] consisting of one person only, and his successors in some particular station, who are incorporated by law in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had." BLACK'S LAW DICTIONARY 410 (rev. 4th ed. 1968).

8. 99 S. Ct. at 1314.

9. *Id.* at 1315.

10. 220 N.L.R.B. 359 (1975). The schools' literature for potential students describes the one school as "a metropolitan, contemporary, college preparatory, seminary high school." *Id.*

ties of the schools are substantially the same as other private and public high schools with the exception of mandatory religious instruction.[11]

In 1974, an affiliate of the Illinois Education Association filed a petition with the Board seeking representation of a unit composed of the lay faculty of the two schools.[12] After the representation hearing,[13]the Board held that its jurisdiction over the schools was not precluded by the discretionary criteria it had established[14] nor by the first amendment religion clauses.[15] Following a Board-supervised election, which the union won, the schools refused to collectively bargain in order to obtain judicial review of the Board's representation decision.[16] The Court of Appeals for the Seventh Circuit[17] de-

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The literature emphasized the overwhelming number of graduates who matriculated at either their first or second choice of colleges. *Id.* Only 16% of the 1974 graduating class went on to the seminary. *Id.*

11. 99 S. Ct. at 1315.

12. *Id.* Section 9(b) of the NLRA, 29 U.S.C. § 159(b) (1976), requires the Board to determine the appropriate unit for the purposes of collective bargaining. For a discussion of the criteria employed by the Board, see ABA LABOR LAW SECTION, THE DEVELOPING LABOR LAW 58-72 (Supp. 1976) [hereinafter cited as THE DEVELOPING LABOR LAW].

Since none of the parties in *Catholic Bishop* objected, the Board expressly excluded religious faculty from the bargaining unit. *Cf.* Seton Hill College, 201 N.L.R.B. 1026 (1973) (religious faculty excluded from bargaining unit of college faculty members). Unit determination questions with respect to the inclusion of religious faculty in lay teachers units have been considered. *Compare* Nazereth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (exclusion of religious faculty affirmed) *with* Niagara Univ. v. NLRB, 558 F.2d 1116 (2d Cir. 1977) *and* NLRB v. Saint Francis College, 562 F.2d 246 (3d Cir. 1977) (reversed Board decisions that excluded religious faculty). *See also* Comment, *The Bargaining Status of Religious Faculty at Church-Affiliated Universities,* 23 CATH. LAW. 33 (1977).

13. 220 N.L.R.B. 359 (1975). Representation hearings are provided for by § 9(c)(1) of the NLRA, 29 U.S.C. § 159(c)(1) (1976). The NLRB usually requires that 30% of the employees express an interest in joining a union before it proceeds with a representation election. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 40 (1976).

14. The Board has never exercised its jurisdiction to the fullest extent. *See* NLRB v. Pease Oil Co., 279 F.2d 135 (2d Cir. 1960), *enforcing,* 123 N.L.R.B. 660 (1959). Initially, the Board required that a case have a significant impact on commerce before it would exercise its jurisdiction. THE DEVELOPING LABOR LAW, *supra* note 12, at 763. *See also* Polish Nat'l Alliance, 42 N.L.R.B. 1375 (1942), *enforced as modified,* 136 F.2d 175 (7th Cir. 1943), *aff'd,* 322 U.S. 643 (1944); Christian Bd. of Publication, 13 N.L.R.B. 534 (1939), *enforced,* 113 F.2d 678 (8th Cir. 1940). In 1950, the Board expressly declared its policy of setting jurisdictional standards for specific categories of enterprises. Hollow Tree Lumber Co., 91 N.L.R.B. 635 (1950).

The Board's policy of discretionary jurisdiction has been explicitly approved by Congress in NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976). The Supreme Court has also spoken approvingly of the policy. NLRB v. Denver Bldg. Trades Council, 341 U.S. 675 (1951).

15. 224 N.L.R.B. 1221, 1222 (1976). The Board rejected the employer's constitutional contentions on the basis that,

> (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion of religious conduct and is necessary to obtain that objective.

Id.

16. 99 S. Ct. at 1316. Section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1976) provides as follows:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States

nied enforcement of the Board's collective bargaining order based on the schools' first amendment claims.[18] The court found that assertion of jurisdiction would constitute both an impermissible involvement in religious activity and a curtailment of the free exercise of religion.[19] The Supreme Court granted certiorari to consider whether the Act granted the Board jurisdiction over church-operated schools and if so, whether the exercise of that jurisdiction violated the first amendment.[20]

The Board first asserted jurisdiction over private nonprofit educational institutions in *Cornell University.*[21] In that case the Board reversed its previous discretionary refusal of jurisdiction[22] because of the "massive impact" of university operations on interstate commerce.[23] Similarly, the Board extended coverage to non-

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court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . .

A representation decision is not a final order of the Board. *See, e.g.,* International Union of Elec., Radio, & Mach. Workers, Local 806 v. NLRB, 434 F.2d 473 (D.C. Cir. 1970). An employer seeking judicial review will refuse to bargain with the union in violation of § 8(a)(1) and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1) and (5) (1976), and wait for the general counsel to issue a complaint and seek summary judgment, which is a final order. *See* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); NLRA, §§ 9(d), 10(e), 29 U.S.C. §§ 159(d), 160(e) (1976). As explained by R. GORMAN, *supra* note 13, at 11, "The object of this circuitious machinery is to deter dilatory challenges in the midst of representation cases which will delay the conduct of an election and the prompt recording of employee preferences on collective bargaining . . . many instances render moot the challenges to the Board representation findings."

17. The Seventh Circuit consolidated *Catholic Bishop* and Diocese of Fort Wayne-South Bend, Inc., 559 F.2d 1112 (7th Cir. 1977), because they posed the same constitutional questions. *Diocese of Fort Wayne* involved five traditional parochial high schools. The special recommendation of a priest was not necessary for admission to the schools. The court determined that due to the result reached in these cases, it was not necessary to give significance to the apparently greater religiosity of the Chicago schools. *Id.* at 1113-14. The procedural history of *Diocese of Fort Wayne* is essentially the same as *Chicago Bishop.* The Board's unfair labor practice decision in *Diocese of Fort Wayne* is reported at 224 N.L.R.B. 1226 (1976); the representation decision, No. 25-RC-5984, was not published.

18. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1122-23 (7th Cir. 1977).

19. *Id.*

20. NLRB v. Catholic Bishop of Chicago, 434 U.S. 1061 (1978).

21. 183 N.L.R.B. 329 (1970).

22. Prior to 1970, the NLRB refused to assert jurisdiction over nonprofit educational institutions. In the leading case of Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951), the Board declared that it would not serve the policies of the Act if the Board asserted "its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purpose and educational activities of the institution." *Id.* at 427. The Board, while basing its decision solely on the legislative history of the charitable hospitals exemption in the 1947 Labor Management Relations Act, acknowledged the weakness of the legislative analysis:

> Regardless of whether or not the Conference Report literally recites the Board's practice prior to the amendment of the Act, it does indicate approval of and reliance upon the Board's asserting jurisdiction over nonprofit organizations "only in exceptional circumstances and in connection with purely commercial activities of such organizations." Whether or not this language provides a mandate, it certainly provides a guide.

Id. See also Sherman & Black, *The Labor Board and the Private Nonprofit Employer: A Critical examination of the Board's Worthy Cause Exemption*, 83 HARV. L. REV. 323, 326-28 (1970).

23. The Board noted the increasing commercial activity at educational institutions that are otherwise still primarily educational. The uncontested facts in *Cornell* stated that Syracuse University, a party to the action, had an annual operating budget of $66 million, including out

profit[24] and proprietary[25] secondary schools with annual revenue that met its jurisdictional requirements.[26]

The issue of Board jurisdiction over church-operated schools first arose in 1974. Two cases involving Jewish after-school educational institutions came before the Board.[27] The instruction offered by the associations was not entirely religious, but was "largely directed to an understanding and appreciation of a particular religion."[28] Sensitive to the first amendment issues involved, the Board declined jurisdiction over the associations. The Board stated that it did not intend to assert jurisdiction over primarily religious institutions "whose educational endeavors are limited essentially to furthering and nurturing their religious beliefs."[29]

The Catholic parochial school cases, which also first arose in

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of state purchases of $5 million. Similarly, the annual expenditures of Cornell University were fixed at over $142 million. 183 N.L.R.B. at 329-30.

Another important factor in the Board's decision was the universities' desire for the Board to assume jurisdiction. The New York State Labor Relations Act, N.Y. LAB. LAW §§ 700-17 (McKinney 1977), was amended in 1969 to remove an exemption for nonprofit educational institutions, 1968 N.Y. LAWS, ch. 890, § 4. Faced with regulation by the more restrictive state labor relations act, the universities petitioned the NLRB to reverse *Columbia University* and preempt the state action. 183 N.L.R.B. at 334. The Board's reversal of *Columbia University* was greatly aided by the Supreme Court's observation in Maryland v. Wirtz, 392 U.S. 183, 194-95 (1968), that "labor conditions in schools . . . can affect commerce . . . . Strikes and work stoppages involving employees of schools . . . obviously interrupt and burden this flow of goods across state lines." For a critical analysis of the Board's approach in *Cornell,* see Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication,* 21 U.C.L.A. L. REV. 63 (1973) (Board's decision based on insufficient data). *But see* Finkin, *The NLRB in Higher Education,* 5 U. TOL. L. REV. 608 (1974).

24. Judson School, 209 N.L.R.B. 677 (1974); Shattuck School, 189 N.L.R.B. 886 (1971).

25. Windsor School, Inc., 200 N.L.R.B. 991 (1972). "As no proper basis exists for establishing a different standard on the sole ground that an employer is operating for profit, we find that the jurisdictional standard . . . for nonprofit secondary institutions is applicable to similar for profit secondary schools." *Id.* at 991.

26. The Board has traditionally adopted its jurisdictional standards for different employer categories on a case-by-case basis. *See* note 14 *supra.* After *Cornell,* however, the Board exercised its rulemaking authority under § 6 of the NLRA, 28 U.S.C. § 156. 29 C.F.R. § 103.1 (1977) provides the following:

> The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitations by the grantor, are not available for use for operating expenses) of not less than $1 million.

The Board has extended the jurisdictional standard to nonprofit and proprietary secondary schools. *See* notes 24 and 25 *supra.* For a catalog of jurisdictional standards for other employer categories, see THE DEVELOPING LABOR LAW, *supra* note 12, at 776-79.

27. Association of Hebrew Teachers, 210 N.L.R.B. 1053 (1974); Board of Jewish Educ., 210 N.L.R.B. 1037 (1974).

28. 210 N.L.R.B. at 1058. The school in *Hebrew Teachers* provided training for nursery school classes and after-school classes for elementary and high school students. The curriculum consisted of courses in Bible, comparative religion, Jewish music, history, literature, philosophy, ethics, social studies, Hebrew language, Zionism, and current events relating to Israel and Jews throughout the world. *Id.* at 1057.

29. 210 N.L.R.B. at 1037. The Board in *Hebrew Teachers* purported to base their denial of jurisdiction cn the atypical nature of the employer and the minimal impact of the schools on interstate commerce. *Id.* at 1053. The school, however, had annual revenues in excess of $1 million. The Board's refusal of jurisdiction is more attributable to deferrence to the first amendment than to the minimal impact on interstate commerce.

1974, presented the Board with a more extensive educational endeavor.[30] The schools not only furthered the goals of Catholicism, but also substituted for a public school education in its entirety.[31] In *Roman Catholic Archdioceses of Baltimore,*[32] the Board clarified its jurisdictional test for religious schools: if the institution taught any secular subjects the Board could exercise jurisdiction over it.[33] This religious "litmus test" has not gone unchallenged.[34] The Board, however, has consistently held that its exercise of jurisdiction over Catholic parochial schools does not violate the religion clauses of the first amendment.[35]

Although the schools in *Catholic Bishop* based their claim for exemption from the Board's jurisdiction on the first amendment, the Court avoided the constitutional issue by statutory construction. It is a well-settled canon that "[a] statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."[36] The majority relied on its earlier opinion in *McCulloch v. Sociedad Nacional de*

30. In 1972 there were over 18,000 elementary and secondary sectarian schools in the United States teaching 5.2 million children. Over 12,000 of these schools, which employed over 107,000 lay faculty members, were affiliated with the Roman Catholic Church. *See* PRESIDENT'S PANEL ON NONPUBLIC EDUCATION, FINAL REPORT 5-6, 15-19 (1972), *reprinted in Hearings on H.R. 16141 and Other Proposals Before the House Comm. on Ways and Means,* 92d Cong., 2d Sess., 118-19, 127-31 (1972).

31. The Catholic schools are integrated into the total educational system of the state. Kauper, *Church and State: Cooperative Separatism,* 60 MICH. L. REV. 1, 34, 36 (1961). The schools stand as *locum tenens* with respect to the state for the purposes of compulsory education statutes and further the state obligation to provide a well-educated population. *See* D. GIANELLA, RELIGION AND THE PUBLIC ORDER 79-83 (1969); Warner, *NLRB Jurisdiction Over Parochial Schools: Catholic Bishop of Chicago v. NLRB,* 73 NW. L. REV. 463, 467 (1978). Implicit in Wolman v. Walter, 433 U.S. 229 (1977), and Board of Educ. v. Allen, 392 U.S. 236 (1968), was the notion that private schools perform a dual role since assistance for purposes not directly involved in religious instruction was upheld as serving a valid public interest.

32. 216 N.L.R.B. 249 (1975) (assertion of jurisdiction over professional employees of five private, religiously oriented high schools).

33. *Id.* at 250. The Seventh Circuit saw the Board's test as essentially "a per se rule that Catholic secondary schools will be subject to its statutory jurisdiction." 559 F.2d at 1118. One commentator has contended that the test stated by the Board in *Archbishop of Baltimore* was inconsistent with Board precedent in *Board of Jewish Education* and *Hebrew Teachers, see* note 28 *supra.* Serritella, *The NLRB and Nonprofit Charitable, Educational, and Religious Institutions,* 21 CATH. LAW. 322, 330 (1975). For a critical analysis of the Board's test see R. CARR & D. VAN EYCK, COLLECTIVE BARGAINING COMES TO THE CAMPUS 283-93 (1973); Kahn, *supra* note 23, at 84; Comment, *The Free Exercise Clause, the NLRA, and Parochial Schools, 126* U. PA. L. REV. 631 (1978); 11 CREIGHTON L. REV. 1321, 1336 (1978).

34. *See, e.g.,* Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975); Henry M. Hald High School Ass'n, 213 N.L.R.B. 415 (1974).

35. *See* note 15 *supra.*

36. Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (Cardozo, J.). *Accord,* Pernell v. Southall Realty, 416 U.S. 363, 365 (1974); International Ass'n of Mach. v. Street, 367 U.S. 740, 749 (1961); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). The principle, however, has obvious limitations. *See, e.g.,* Shapiro v. United States, 335 U.S. 1, 31 (1948), in which Chief Justice Vinson warned, "The canon of avoidance of constitutional doubts must, like the 'plain meaning' rule, give way where its application would produce a futile result, or an unreasonable result 'plainly at variance with the policy of the legislation as a whole.' "

Marineros de Honduras[37] as an example of the application of this prudential policy to the Act. The Court in *McCulloch* required an "affirmative intention of Congress clearly expressed,"[38] before it would conclude that the Act granted jurisdiction that gave rise to a serious constitutional question.

Applying the *McCulloch* test, the Court inquired whether the Board's exercise of jurisdiction presented a significant risk of first amendment infringement.[39] Analogizing to its recent decisions involving governmental aid to parochial schools,[40] the Court concluded that "[g]ood intentions by government . . . can surely no more avoid entanglement with the religious mission of the school in the setting of collective bargaining than in the well motivated legislative efforts consented to by the church-operated schools which we found unacceptable."[41] The entanglement doctrine to which the Court referred was developed in *Walz v. Tax Commission.*[42] The *Walz* Court stated that legislation that neither sponsored nor inhibited religion could still violate the establishment clause if it called for "official and continuing surveillance" of church activities by the government.[43]

Before a court can apply the entanglement analysis, a determination of the religious nature of the schools must be made in order to assess the effect of the governmental intrusion. The Court of Appeals in *Catholic Bishop* criticized the Board's "completely reli-

37. 372 U.S. 10 (1963). In *McCulloch,* the Board asserted jurisdiction over the Honduran crew of a ship in United States waters under a Honduran flag. The ship was owned by a wholly owned subsidiary of a United States corporation. The Board used a test in which it balanced the foreign versus the United States contacts. The Court relied in part on its previous decision in Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957), which stated that the legislative history "inescapably describes the boundaries of the Act as including only workingmen of our own country and its possessions." *Id.* at 144. The Court also noted that the State Department and the Congress had policies of recognizing the flag of the ship as determinative of its nationality. Cognizant of the legislative history, the judicial precedent, and the international implications, the Court construed the Act as not granting the Board jurisdiction over foreign seamen.

38. 99 S. Ct. at 1319.

39. *Id.* at 1320. By limiting the inquiry to whether there was a "significant risk" of infringement, the Court avoided deciding the constitutional issues. Constitutional interpretation, however, may not be avoided since "tentative interpretations may be ventured in the very process of stating what constitutional issues are being avoided; there may be temptation to launch constitutional trial balloons and indulge in free floating constitutional dicta without the restraints of fashioning constitutional law dispositive of the case." G. GUNTHER, CONSTITUTIONAL LAW 1604 (9th ed. 1975).

The Court's inquiry into the entanglement doctrine did not go far enough. A constitutional inquiry cannot stop at the point of entanglement because the "first amendment rights must be balanced against secular considerations. In each case a different level of entanglement may be tolerated." Warner, *supra* note 31, at 491. *See also* Tilton v. Richardson, 403 U.S. 672 (1971). The Court's inquiry focused on the degree of entanglement without considering the congressional objectives or the effect of its decision on the lay teachers' rights.

40. Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

41. 99 S. Ct. at 1319.

42. 397 U.S. 664 (1970).

43. *Id.*

gious/religiously associated" test as being too simplistic.[44] The court substituted its own determination that the schools were "religiously pervasive institutions," based not on the record, but on the findings of the parochial aid cases, for the Board's determination.[45] The Supreme Court substantially followed the determination of the Court of Appeals.[46] State support of church-operated schools, however, presents issues quite distinct from those raised by the uniform application of labor regulations to all employers.[47] In determining where to draw he line between church and state, the courts must assess not only the "character and purpose" of the religious organization involved, but also the type of legislation to be applied and "the resulting relationship between the state and religious authority."[48]

Faced with the Court's determination of the religious nature of the schools, the Board argued that it could still avoid excessive entanglement since it would only resolve factual issues unrelated to differences of religious interpretation.[49] Support for the Board's position is found in *Associated Press v. NLRB,*[50] which held that the Board was capable of severing the nonconstitutional issues from those arising under the first amendment in an unfair labor practice proceeding.[51] The dissent in *Catholic Bishop* felt that *Associated Press* was indistinguishable in terms of the claim made by the em-

44. 559 F.2d at 1118. *Accord,* Note, *The Religion Clauses and NLRB Jurisdiction Over Parochial Schools,* 54 NOTRE DAME LAW. 263, 297 (1978).

45. 559 F.2d at 1122. *But cf.* Lemon v. Kurtzman, 403 U.S. 602, 667 (1971) (White, J., dissenting) (stating that the majority had ignored the factual findings of the district court that religious values did not necessarily affect the content of secular instruction).

46. 99 S. Ct. at 1319.

47. *See* K. Kryvoruka, *The Church, The State and the National Labor Relations Act: Collective Bargaining in the Parochial Schools,* 20 WM. & MARY L. REV. 33, 47-49 (1978); Note, *supra* note 44, at 286.

48. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 851 (1978).

49. 99 S. Ct. at 1319. *See* K. Kryvoruka, *supra* note 47, at 36-37; note 61 *infra.*

50. 301 U.S. 103 (1937). Associated Press was an organization of newspapers for the collection and distribution of news. Watson, an employee of Associated Press, had the duty of determining the news value of items received and rewriting them for distribution. He was fired for union activity and the Board asserted jurisdiction. The Supreme Court, in holding that the freedom of the press was not abridged by the application of the Act, stated,

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published.

Id. at 132-33.

51. A distinction between the secular and religious functions of parochial schools was the premise on which some forms of state aid were upheld in Wolman v. Walter, 433 U.S. 229 (1977). *See* Comment, *Wolman v. Walter and the Continuing Debate over State Aid to Parochial Schools,* 63 IOWA L. REV. 543 (1977). For other examples of administrative separation of religious and secular functions see Tilton v. Richardson, 403 U.S. 672 (1971) (nonpublic colleges and universities); Gillette v. United States, 401 U.S. 437 (1971) (conscientious objector exemption from selective service); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemptions for church property).

ployer and the type of problem the Board was required to decide.[52] The opinion of the court failed to explain why the *Associated Press* first amendment problem was any less significant than the problem in *Catholic Bishop.*[53] The majority refused to decide the Board's contention that it could avoid excessive entanglement since it would require a full constitutional inquiry. The majority did, however, counter the contention with two examples that would require the Board to go beyond resolving nonreligious factual issues.[54]

The Board was created to implement the unfair labor practice provisions of the Act.[55] It is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."[56] The current judicial interpretation of this section of the Act, as summarized in *NLRB v. Great Dane Travelers, Inc.,*[57] holds that "if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."[58] If the employer asserts a religious motive as a justification for the discriminatory conduct, the Board would have to judge

52. 99 S. Ct. at 1327 (Brennan, J., dissenting). Associated Press asserted that it could not be free to furnish impartial news unless it was equally free to determine the bias of its editorial employees. 301 U.S. at 131.

53. 99 S. Ct. at 1327 (Brennan, J., dissenting).

54. *See* notes 60 and 64 *infra.* It has also been argued that the initial assertion of jurisdiction in order to determine the appropriate bargaining unit constitutes an impermissible encroachment of the school's religious freedoms. *See* McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978) (preliminary injunction granted to restrain Board from initial assertion of jurisdiction; same constitutional issues raised); Caulfield v. Hirsch, 410 F. Supp. 618 (E.D. Pa. 1977) (Board enjoined from asserting jurisdiction over unit of 273 elementary schools in the diocese of Philadelphia). *But see* Grutka v. Barbour, 549 F.2d 5 (7th Cir. 1977) (encroachment not sufficient to allow district court injunction).

55. "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." NLRA § 10(a), 29 U.S.C. § 160(a) (1976).

56. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976). Unfair labor practice cases provide potentially greater constitutional dangers than representation hearings. The unfair labor practice proceeding is adversarial in terms of procedural and evidentiary practice. NLRB Unfair Labor Practice Procedure, 29 C.F.R. §§ 102.39, 102.66 (1979); THE DEVELOPING LABOR LAW, *supra* note 12, at 828, 834-35. *See* NLRA § 10(b), 29 U.S.C. § 160(b) (1976).

57. 388 U.S. 26 (1967) (unfair labor practice for an employer to grant vacation pay only to those employees not participating in a strike).

58. *Id.* at 34. The Court in Associated Press v. NLRB, 301 U.S. 103, 132 (1937), stated the following:

> The [A]ct permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. . . . The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the [A]ct declares permissible.

See Radio Officers' Union v. NLRB, 347 U.S. 17, 42-44 (1954); Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Shipbuilding and Great Dane Trailers,* 70 COLUM. L. REV. 81 (1970); Comment, *Employer Discrimination Under Section 8(a)(3),* 5 U. TOL. L. REV. 722 (1974); 48 B.U.L. REV. 142 (1968).

whether the motive is "legitimate and substantial."[59] The majority in *Catholic Bishop* felt that the very process of the inquiry may impinge on first amendment rights.[60] The Board could avoid the determination of religious doctrine only by taking all religious claims at face value. The Court of Appeals, however, rejected this practice of accommodation as an infraction of the establishment clause.[61]

The Act requires both parties to engage in good faith bargaining

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59. 388 U.S. at 34. "[T]he burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *Id.*

For a critical analysis of the Supreme Court's interpretation of the role of motive in unfair labor practices see Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality,* 77 YALE L.J. 1269 (1968). The authors argue that the role of motive has been warped from its original statutory design as evidence of discrimination to the ostensibly controlling element. *Id.*

60. 99 S. Ct. at 1320. The Board's enforcement proceedings can be analogized to civil court proceedings to adjudicate church property disputes since the Board functions as a judicial tribunal in certain matters under the Act. The Court in Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), established the doctrine of "marginal judicial involvement."

> Civil Courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded. . . . [T]he First Amendment enjoins the employemt of organs of government for essentially religious purposes. . . .

Id. at 449.

Thus, the Supreme Court did not bar civil courts from hearing ecclesiastical property disputes, but only barred such suits from being decided on ecclesiastical grounds. *Id.* at 449-52. In a later case involving an intrachurch property dispute, the Supreme Court abandoned the "marginal judicial involvement" doctrine. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), held that civil courts must accept the decisions of religious authorities on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. *Id.* at 713. The *Milivojevich* principle prohibits the Board from deciding the merits of the employer's religious defense. *See* Sampen, *Civil Courts, Church Property, and Neutral Principles: A Dissenting View,* 1975 U. ILL. L.F. 543. It appears, however, that an inquiry into the good faith of the religious defense would be permissible. Comment, *supra* note 33, at 655. *See* United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78, 88 (1944).

61. 559 F.2d at 1129. Judge Pell, writing for the majority of the court, stated,

> A "reasonable accommodation" by the Board "to the religious purposes of the school" on the presentation of a doctrinal issue in an unfair labor practice case would implicitly appear to us to involve the necessity of explanation and analysis, and probably verification and justification, of the doctrinal precept involved, all of which would itself erode the protective wall afforded by the constitutional right.

Id.

Accommodation means an adjustment or an adaption or a compromise and settlement involving a first amendment right. *Id. See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-4 to 14-5 at 819-26 (1978), for a discussion of the meaning of accommodation:

> 'The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.' This approach does, of course, entail a notion of accommodation—recognizing that there are necessary relationships between government and religion; that government cannot be indifferent to religion in American life; and that, far from being hostile or even truly indifferent, it may, and sometimes must, accommodate its institutions and programs to the religious interest of the people.

Id. at 822 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963)). *Cf.* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 734 (1976) (Rehnquist, J., Stevens, J., dissenting) (acceptance of religious tribunal decisions in property dispute, without inquiry created greater establishment problems than the free exercise concerns avoided). *But cf.* Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975) (an EEOC regulation, under Title VII of the Civil Rights Act of 1964, requiring accommodation of employees did not violate establishment clause).

over "wages, hours, and other terms and conditions of employment."[62] The Board has the power to decide what are terms and conditions of employment and, therefore, mandatory subjects of bargaining. The majority found an implication of "sensitive issues" if the school refused to bargain over a mandatory subject it considered a matter of religious policy.[63] The Board would be placed in the position of deciding which issues are religious enough to warrant exemption from the bargaining requirement. The Board would be required to evaluate the good faith of the school's refusal to bargain and whether the religious doctrine the school was asserting actually applied to the subject under consideration.[64] It has been argued that the governmental intrusion is minimal since the Board is powerless to insist upon an agreement or compromise on any proposal.[65] Even though the substantive terms are left to the bargaining parties, the coercive effect of the Board's determination remains. The use of economic force through a strike is permissible to win concessions on mandatory subjects of bargaining if an agreement cannot be reached.[66]

The Court found that the Board's exercise of jurisdiction over church-operated schools created a sufficient risk of first amendment infringement to implement the *McCulloch* test.[67] The majority ex-

62. NLRA § 8(d), 29 U.S.C. § 158(d) (1976) defines "bargain collectively" as "the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation dues not compel either party to agree to a proposal or require the king of a concession."

63. 99 S. Ct. at 1320. The Board has not determined what are "terms and conditions" of employment in teacher negotiations. *Id. See generally,* THE DEVELOPING LABOR LAW, *supra* note 12, at 379-439. One of the main concerns is the infringement on the administrative autonomy of the employer. "Once collective bargaining is established it is very difficult to restrict the scope of bargaining to a narrow range of employment issues. Faculty bargaining in particular, has the potential of touching virtually every governance issue that is subject to major dispute." CAMPUS EMPLOYMENT RELATIONS 4 (T. Tice ed. 1976). *See* Brown, *Collective Bargaining In Higher Education,* 67 MICH. L. REV. 1067, 1075 (1969) (obligation to bargain results in "transmutation of academic policy into employment terms").

64. *See* notes 60 and 61 *supra.* The obligation of good faith bargaining has been held not to conflict with any free exercise value. Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883 (D.C. Cir. 1970) (Act sufficiently invested with public interest to require good faith bargaining from employer whose religious beliefs preclude recognition of union).

65. *See* note 62 *supra. See* Kryvoruka, *supra* note 47, at 54-55, who argues that the purpose of the Act is to encourage collective bargaining with a minimum of government involvement. Only when the bargaining process breaks down does the Board intervene. Even then, the actual substantive terms are left to the parties. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883 (D.C. Cir. 1970).

66. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960). Even though the employees engaged in unprotected harassment for which they could have been fired, the Supreme Court held that their conduct did not constitute a refusal to bargain in good faith as required by 8(b)(3) of the NLRA. Noting that Congress did not intend the NLRB to regulate the substantive terms of labor agreements, the Court stated, "[I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *Id.* at 490. *See* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); Murphy, *Impasse and the Duty to Bargain in Good Faith,* 39 U. PITT. L. REV. 1 (1977); Comment, *supra* note 33.

67. "We see no escape from conflicts flowing from the Board's exercise of jurisdiction

amined the Act and its legislative history in search of the express intention of Congress to include church-operated schools under its coverage. Failing to find any mention of the subject in the Act or the congressional reports, the majority concluded that Congress "simply gave no consideration to church-operated schools."[68] The Board, therefore, failed to justify its assertion of jurisdiction under the *McCulloch* test and the Court avoided the constitutional issue.[69]

Mr. Justice Brennan's dissenting opinion stated that *McCulloch* was neither a relevant precedent nor an accurate expression of the well-settled canon of construction the majority purported to use.[70] The history of the Act and a prior Supreme Court case[71] affirmatively indicated that Congress did not intend to cover the foreign seamen in *McCulloch.* Only when confronted with a clear conflict between the broad coverage of the Act and part of its legislative history did the Court require an affirmative showing of congressional intent.[72] Noting the absence of any contrary legislative history or precedent with respect to jurisdiction over church-operated schools, the dissent felt that the application of the *McCulloch* test was inappropriate.[73] Justice Brennan asserted that the well-settled canon of construction stated by the majority is limited to constructions that are "fairly possible" and "reasonable."[74] These requirements are considerably less severe than the "affirmative intention clearly expressed" test of *McCulloch*. The *McCulloch* standard is unrealistic in light of the type of statute involved. Congress gave the Board power to order elections when "a question of representation affecting commerce exists"[75] and "to prevent any person from engaging in any unfair labor practice affecting commerce."[76] Given the legislative process, "explicit expressions of congressional intent in such broadly

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over teachers in church-operated schools and the consequent serious first amendment questions that would follow." 99 S. Ct. at 1320.

68. *Id.* at 1321. *But see* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring), in which the Justice argued against the use of legislative history in interpreting the acts of Congress.

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous. . . . It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval. . . . It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record.

Id. at 395-96.

69. 99 S. Ct. at 1322.

70. *Id.* at 1323.

71. Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957). *See* note 37 *supra.*

72. *See* note 37 *supra.*

73. The Supreme Court has made statements concerning the proper interpretation of the Act. The Act "purports to reach only what may be deemed to burden or obstruct . . . commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. . . . It is the effect on commerce, not the source of the injury, which is the criteria." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31-32 (1937).

74. 99 S. Ct. at 1324. *See* note 36 *supra.*

75. NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (1976).

76. NLRA § 10(a), 29 U.S.C. § 160(a) (1976).

inclusive statutes are not commonplace."[77]

The dissent would construe the Act to cover all employers whose businesses "affect commerce" and who are not expressly exempted in the definitional section.[78] This approach is consistent with a long line of Supreme Court decisions that "Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."[79] It has been questioned whether this interpretation sweeps too broadly since the commerce clause was not considered to be as expansive at the time of the Act's passage as it is today.[80] Congress, however, foresaw the possibility of changes in the judicial interpretations of its power. The Senate Report on the Act stated, "While this bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power in preventing . . . unfair labor practices."[81]

The Court in *Catholic Bishop* exceeded its proper judicial role. It has in effect added an exception to the eight already in the Act without any "evidence that Congress did intend an exception it never stated."[82] It is significant that Congress considered and rejected an amendment that would have had the same affect as the

77. 99 S. Ct. at 1323. The Congress sought to create a broad solution to the problem of strikes and other industrial unrest that burdened commerce. "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining." NLRA § 1, 29 U.S.C. § 151 (1976).

78. 99 S. Ct. at 1324. Section 2(2) of the NLRA, 29 U.S.C.§ 152(2) (1976) defines "employer" as including,

> any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"[T]he broad language of the Act's definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts." NLRB v. Hearst Publications, 322 U.S. 111, 129 (1944).

79. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (per curiam) (emphasis in original). *See, e.g.,* Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944) (nonprofit fraternal benefit society providing insurance to its members); NLRB v. Fainblatt, 306 U.S. 601 (1938) (employer whose own business involved no interstate commerce, but processed materials shipped to and from employer by foreign customers); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (single, local plant of vertically integrated steel corporation).

80. Comment, *supra* note 33, at 638. *Compare* Carter v. Carter Coal Co., 298 U.S. 238 (1936) *with* Katzenbach v. McClung, 379 U.S. 294 (1964).

81. S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935), *reprinted in 2* NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2318-19 (1935). *See also* STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION (F. Koretz ed. 1970).

82. 99 S. Ct. at 1327 (Brennan, J., dissenting). In a case involving a question of Board jurisdiction over private nonprofit institutions of higher learning, the Court of Appeals for the First Circuit asserted, "[W]hile there are good arguments against permitting faculty members to bargain collectively, the converse is not so unthinkable as to justify our writing into the Act a jurisdictional exclusion where none now exists." NLRB v. Wentworth Inst., 515 F.2d 550, 556 (1st Cir. 1975).

majority's construction of the Act. The 1947 House version of the Labor Management Relations Act specifically exempted nonprofit, religious, or educational employers.[83] After conferring with the Senate, however, the exemption was limited to nonprofit hospitals and passed in that form.[84]

Since the passage of the Act in 1935, the Court has consistently interpreted the Board's jurisdiction as being coextensive with the commerce clause. By creating an exception to this interpretation based on statutory construction,[85] the Court has avoided the constitutional questions involved, but has done so at the expense of considerable uncertainty. An exception for church-operated schools creates a potential establishment question of its own. This potential has been reinforced by the Board's narrow interpretation of *Catholic Bishop.* The Board has made a distinction between church-operated schools and schools that, although religiously oriented, are operated by an independent board of directors.[86] Had the Court denied the Board jurisdiction based on the first amendment, such tenuous dis-

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83. H.R. 3020, 80th Cong., 1st Sess. § 2(2) (1974), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947 161-62 (1948). The bill specifically stated that the "term 'employer' . . . shall not include . . . any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."

84. The Conference Report for the 1947 Amendments to the Act stated that "only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act." H.R. REP. NO. 51 , 80th Cong., 1st Sess. 32 (1947), *reprinted in* [1947] U.S. CODE CONG. SERV. 1135, 1137. *But see* Sherman & Black, *supra* note 22, at 1331-37 (contending that the Board's actual policy before 1947 did not support the Conference Agreement's conclusion that jurisdiction was asserted over nonprofit employers only in "exceptional circumstances").

The Congress eliminated the nonprofit hospital exemption in 1974. The Senate considered and rejected an amendment by Senator Ervin that would have created an exception for hospitals operated by religious organizations. 120 CONG. REC. 12950, 12968 (1974). Senator Cranston, noting the existing national policy of holding religiously affiliated institutions to the same standards as their nonsectarian counterparts, stated:

> [o]ne can truly say that this Nation owes religious groups throughout the country a debt of gratitude for these many years of selfless social service. But this debt cannot and must not, include a subsidy from the workers themselves, which in effect is what this amendment would provide by denying them rights under the NLRA.

120 CONG. REC. 12957 (1974).

85. For an interesting comparison, see United Steel Workers of America v. Weber, 99 S. Ct. 2721 (1979), in which Chief Justice Burger and Justice Brennan switch roles. Justice Brennan, speaking for the majority, interpreted Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), as not condemning all private affirmative action plans. Chief Justice Burger, in dissent, criticized the majority's approach as amendment by construction, utilizing many of Justice Brennan's arguments in *Catholic Bishop.*

86. Diocese of Brooklyn, 101 L.R.R.M. 1436 (1979) (3-1 decision). The case involved Bishop Ford Central Catholic High School, which had previously been operated by the Bishop of Brooklyn. In 1976, the Bishop transferred operation of the school to an independent board of the Fathers' Guild and the Mothers' Guild. The school remained religiously-oriented with a distinctly sectarian mission. The Board held that since it was governed by an independent board, the school was not church-operated and therefore not within the Supreme Court holding in *Catholic Bishop.* The Board, however, has withdrawn its jurisdiction over schools directly operated by the Church. Archdiocese of Philadelphia, 102 L.R.R.M. 1126 (1979); Gordon Technical High School, 101 L.R.R.M. 1592 (1979).
[Casenote by Dean A. Crabtree]

tinctions would have been obviated. Since the Court relied only on the Act and not the first amendment, it has also created the possibility of state labor boards asserting jurisdiction over the schools. The *Catholic Bishop* holding has opened the door to further attack on the Board's jurisdiction. Employers will need only show a "significant risk" of constitutional infringement to involve the courts in the dubious chore of interpreting legislative history.

TORTS—HUSBAND AND WIFE—NEBRASKA ABROGATES INTERSPOUSAL TORT IMMUNITY. *Imig v. March*, __ Neb. __, 279 N.W.2d 382 (1979).

In *Imig v. March,*[1] the Supreme Court of Nebraska abolished the doctrine of interspousal immunity for all tort claims arising in the State. This decision means that no longer will a marital relation between tortfeasor and victim be grounds for dismissal of an otherwise meritorious claim. The *Imig* decision places Nebraska in the emerging majority of states that have either partially or fully abrogated the interspousal tort immunity doctrine.[2]

On February 26, 1977, Lois Schaap was flying in a private plane piloted by her husband Otto. He allegedly caused the plane to make several loops and rolls. Unable to pull out of the recovery dive, the plane crashed and burned, killing both occupants.[3] A suit in tort was brought by the personal representative of Mrs. Schaap against the estate of Otto Schaap, charging his negligence and gross negligence as the proximate cause of his wife's death.[4] Defendant filed a demurrer to the charges, based on firmly established Nebraska common law that held husband and wife immune from tort liability for injury or death to the other spouse during marriage.[5] The trial court sustained the demurrer, and plaintiff appealed.[6]

The issue presented on appeal to the Nebraska Supreme Court was whether the interspousal tort immunity doctrine should be abrogated in an action for wrongful death. Taking into account Nebraska's wrongful death statute[7] that establishes a clear cause of

1. __ Neb. __, 279 N.W.2d 382 (1979).

2. *See* notes 92-98 and accompanying text *infra.*

3. *See* Brief for Appellant at 7, Imig v. March, __ Neb. __, 279 N.W.2d 382 (1979).

4. These allegations were not considered at trial since the court first had to rule on the procedural defense of interspousal tort immunity raised by decedent-husband's representative. The ultimate disposition by the Nebraska Supreme Court was to reverse dismissal and remand the case for trial on the merits. __ Neb. at __, 279 N.W.2d at 387.

5. The common-law doctrine of interspousal tort immunity was first given judicial recognition in Nebraska in Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927). That case held that statutes granting married women legal rights extended to property and contract, but not to the right of recovery against a spouse for personal injury. *See* notes 38-43 and accompanying text *infra.*

6. __ Neb. at __, 279 N.W.2d at 383. Petitioner contended that since the doctrine was of common law and not statutory origin, the Nebraska Supreme Court had the power to modify it.

7. The Act provides the following:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person, company or corporation, and the act, neglect, or default is such

action on the facts of the case, a provision in the State Constitution,[8] for open courts, absence of contrary legislation,[9] and a growing body of case law in other states supporting abrogation,[10] the court overruled the interspousal immunity doctrine. Significantly, the holding went beyond the pleadings and abolished the defense for *all* interspousal tort actions.[11] Finding historical justifications for interspousal iunity no longer applicable to contemporary needs, the court enunciated a new open-door policy in which tort claims would be litigated on the merits, notwithstanding marital status.

Interspousal tort immunity has its roots in the common-law doctrine of the legal identity of husband and wife.[12] At common law when a woman married all of her legal rights and claims were merged into those of her husband.[13] She had no capacity to sue or be sued in her own name. When she did have a cause of action, it could be brought in her husband's name only or he could be joined as plaintiff.[14] Likewise, if the wife had the capacity to commit a tort during marriage, she could not be sued without her husband being joined as defendant.[15] Because a woman's legal identity was suspended during coverture,[16] an interspousal tort suit was a procedural

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as would, *if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof,* then and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

NEB. REV. STAT. § 30-809 (1975) (emphasis added).

8. "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." NEB. CONST. art. 1, § 13.

9. Nebraska's married women's statute reads in part, "A woman may while married sue and be sued, in the same manner as if she were unmarried." NEB. REV. STAT. § 25-305 (1975).

10. *See, e.g.,* Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Herget Nat'l Bank of Pekin v. Berardi, 31 Ill. App. 3d 689, 335 N.E.2d 39 (1975); *In re* Estate of Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970); Robinson's Adm'r v. Robinson, 188 Ky. 49, 220 S.W. 1074 (1920); Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965); Poepping v. Lindemann, 268 Minn. 30, 127 N.W.2d 512 (1964); Deposit Guar. Bank & Trust Co. v. Nelson, 212 Miss. 335, 54 So. 2d 476 (1951); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977).

11. The court declared, "It would appear that in light of the so-called 'married woman's act' the historical basis for interspousal immunity no longer exists. If this be a 'startling innovation,' so be it." Imig v. March, __ Neb. __, 279 N.W.2d 382, 385 (1979). *See* notes 77-79 and accompanying text *infra* for discussion of the scope of the court's holding.

12. *See* 1 W. BLACKSTONE, COMMENTARIES *443 for a statement on the legal consequences of marriage at common law. *See also* McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303, 303-07 (1959); McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030, 1031-35 (1930); RESTATEMENT (SECOND) OF TORTS § 895F, Comments b and c at 424-25 (1979).

13. *See* Haskins, *The Estate by Marital Right,* 97 U. PA. L. REV. 345 (1949) for commentary on property rights at common law.

14. Rogers v. Smith, 17 Ind. 323 (1861); Laughlin v. Eaton, 54 Me. 156 (1866).

15. Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 A. 454 (1911).

16. A married woman only had these disabilities at law and not in equity. At Chancery, property and contract rights of the married woman have always been recognized. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 154 n.18 (3d ed. G. Chase 1900).

impossibility.

By the time *Imig v. March*[17] was decided, Nebraska, like all other states, had enacted a married women's statute.[18] The law removed many of the wife's common-law disabilities, particularly in the property and contract domains.[19] Underlying statutory differences[20] and varying judicial interpretations of the Act, was the basic premise that the married woman was to regain legal rights and responsibilities lost at marriage and be placed on a legal footing equal to her husband.[21] This statutory grant established a new dimension in the legal relation between husband and wife, but there was little consistency among courts[22] concerning the scope and nature of this change. Although passage of married women's statutes endowed the husband with no new rights per se, suits by the husband against the wife following her recognition as a separate legal entity were not uncommon.[23] Actions in ejectment,[24] suits to collect rent,[25] and trover proceedings[26] were litigated between spouses. In regard to personal tort actions, however, the raising of the legal status of the wife to a position of equality with her husband ironically caused the great lag in the evolution of interspousal tort rights. Since the legal unity theory foreclosed the right of the husband to sue his wife for personal injury,[27] the legal capacity granted to women "to sue and be sued"[28] was interpreted as expanding rights only in regard to property and

17. __ Neb. __, 279 N.W.2d 382 (1979).

18. Married women's statutes began appearing in 1844 in the United States, *see, e.g.,* ME. REV. STAT. tit. 19, §§ 161-65 (1964), and developed steadily through the nineteenth and early twentieth centuries. Nebraska's married women's statute, see note 9 *supra,* was enacted in 1893 and first interpreted in Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894). The court in *Skinner* held that a wife as landlord could maintain an action against the tenant for the value of unpaid rents, notwithstanding the fact that the tenant was her husband.

19. For the early cases interpreting Nebraska's married women's statute as extending rights only in areas of property and contract, see Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894); Godfrey v. Megahan, 38 Neb. 748, 57 N.W. 284 (1894); May v. May, 9 Neb. 16, 2 N.W. 221 (1879).

20. For an excellent statutory classification scheme, see McCurdy, 43 HARV. L. REV. 1030, *supra* note 12, at 1037.

21. One of the weakest justifications for denying the right of interspousal tort claims of passage of the married women's statutes is the argument that since under the Act a married woman is to have the same rights as an unmarried woman then she should not be permitted to bring an action against her husband, because an unmarried woman has no husband to sue. Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894), *construed in,* Imig v. March, __ Neb. __, 279 N.W.2d 382, 384 (1979).

22. *Compare* Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914), *with* Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927).

23. *See generally* McCurdy, 43 HARV. L. REV. 1030, *supra* note 12, at 1039-40.

24. Crater v. Crater, 118 Ind. 521, 21 N.E. 290 (1889); McKendry v. Fessler, 131 Pa. 24, 18 A. 1078 (1890).

25. Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894).

26. Gillespie v. Gillespie, 64 Minn. 381, 67 N.W. 206 (1896).

27. *See, e.g.,* Barnett v. Harshbarger, 105 Ind. 410, 5 N.E. 718 (1885); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915).

28. *See, e.g.,* NEB. REV. STAT. § 25-305 (1975), *partially quoted at* note 9 *supra.*

contract, unless legislation specifically stated otherwise.[29] While it was the wife who was most often adversely affected by the immunity from tort claims, it was nonetheless equally applicable to the husband,[30] and as one court stated, "Both spouses have the same disability and the equality is complete."[31] This justification has strongly dominated judicial thinking to the great expense of affording a remedy to deserving plaintiffs.[32]

Even when the married women's act could be interpreted to permit an interspousal suit for a tort claim, courts found a veritable array of policy arguments that easily perpetuated the immunity doctrine.[33] In 1910 the United States Supreme Court rendered a decision in the case of *Thompson v. Thompson,*[34] on an appeal from the Court of Appeals of the District of Columbia. At issue was whether a provision of the Code of the District of Columbia giving married women the right "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried"[35] meant that a wife could bring a tort suit against her husband, in this case for assault and battery. The Court rested its denial of the wife's right to sue on hypothesized "legislative intent"[36] in drafting the statute and on the

29. The following are the only examples of legislation specifically passed to regulate interspousal tort liability:

Illinois: ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd Supp. 1953) prohibits all tort suits between spouses. It was passed following the Illinois Supreme Court decision in Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952), holding a husband liable to wife for negligent injury.

North Carolina: N.C. GEN. STAT. § 52-10.1 (Supp. 1953) gives a right of action in tort to husband and wife in interspousal suits.

Wisconsin: WIS. STAT. § 246.075 (1931) expressly states that a husband has the right to bring a personal injury action against his wife. A wife's right to bring a similar action against her husband had been established earlier by the courts.

New York: 1937 N.Y. LAWS, ch. 669 gives a husband or wife a right of action against the other spouse for personal and property injuries.

30. Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Hanna v. Hanna, 143 Ind. App. 521, 241 N.E.2d 376 (1968), *overruled by, In re* Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970); Brawner v. Brawner, 327 S.W.2d 808 (Mo. 1959).

31. Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, __, 216 N.W. 297, 299 (1927). *But see* Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938), for a different view of the equality of disability problem; Oklahoma was one of the first states to permit interspousal suits. *Id.* at __, 87 P.2d at 662.

32. The following decisions were based on the premise that the married women's statutes impacted the interspousal immunity doctrine: Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Packenham v. Miltimore, 89 Ill. App. 2d 452, 232 N.E.2d 42 (1967); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Lucas v. Phillips, 205 Tenn. 444, 326 S.W.2d 905 (1957). *Contra,* Fisher v. Toler, 194 Kan. 701, 401 P.2d 1012 (1965); Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960), *overruled by,* Lusby v. Lusby, __ Md. __, 390 A.2d 77 (1978); Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961).

33. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 862-64 (4th ed. 1971); McCurdy, 43 HARV. L. REV. 1030, *supra* note 12, at 1050-54.

34. 218 U.S. 611 (1910).

35. *Id.* at 615-16.

36. "The statute was not intended to give a right of action as against the husband, but to allow the wife in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband." *Id.* at 617.

traditional policy concerns of promoting domestic harmony, fear of spawning trivial litigation between spouses, and the presumption that an adequate remedy for assault and battery could be found through criminal or divorce proceedings.[37]

Emerson v. Western Seed and Irrigation Co.[38] established the interspousal tort immunity doctrine in Nebraska in 1927. Relying on policy considerations akin to those enunciated by the Supreme Court in *Thompson,* the Nebraska Supreme Court ruled that interspousal liability would create procedural difficulties in litigating husband-wife suits,[39] dangerously disrupt the secrecy and intimacy of the marital relation,[40] create a risk of fraud and collusion,[41] open the courts to a floodgate of litigation,[42] and be a "startling innovation."[43] Such changes, the court stated, should come from the legislature,[44] not the judiciary. The state of the law in Nebraska in regard to interspousal immunity remained unchanged for over half a century between *Emerson* and *Imig v. March.*[45]

While interspousal tort immunity has fallen into unanimous disrepute within the legal community,[46] it is still viable in approxi-

37. Although the Supreme Court's decision reflected the majority view in the country and did much to impede later efforts to modify the doctrine of interspousal tort immunity, it is Justice Harlan's dissenting opinion that is represented in the contemporary trend toward abrogation. Justice Harlan advocated strict interpretation of statutory language without reliance on hypothesized legislative intent. *Id.* at 619-24. *Compare* Justice Harlan's approach *with* the majority opinion in Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965), which suggests that when a court abrogates the doctrine, the decision should be based on a flat rejection of common-law tradition rather than statutory interpretation.

38. 116 Neb. 180, 216 N.W. 297 (1927). In *Emerson,* the court barred a wife from collecting damages from her husband's employer for injuries resulting from the husband's negligence in driving the employer's automobile in the course of business. The court reasoned that allowing a wife to recover against a third party for the negligence of her husband would be "countenancing an encircling movement where a frontal attack upon the husband is inhibited." *Id.* at 299.

39. The court never clarified what "procedural difficulties" in interspousal tort suits make these suits any more problematic to litigate than interspousal property and contract suits.

40. *Contra,* W. PROSSER, *supra* note 33, at 863.

41. *See, e.g.,* Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963). *Contra,* Goller v. White, 20 Wis. 2d 402, 410, 122 N.W.2d 193, 196 (1963).

42. For the more widely accepted view that courts do not become cluttered with trivial marital claims see Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Taylor v. Patten, 2 Utah 2d 404, __, 275 P.2d 696, 699 (1954); Goode v. Martinis, 58 Wash. 2d 229, 234, 361 P.2d 941, 944 (1961). *See generally,* W. PROSSER,, *supra* note 33, at 864.

43. Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, __, 216 N.W. 297, 298 (1927). The court's refusal to redefine spousal rights and obligations in light of married women's statutes and contemporary needs is reflected in this type of justification for maintaining the immunity doctrine. *See generally* notes 52-53 and accompanying text *infra.*

44. *Accord,* Thompson v. Thompson, 218 U.S. 611 (1910); Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974); DiGirolamo v. Apanavage, 454 Pa. 557, 312 A.2d 382 (1973); Schultz v. Christopher, 65 Wash. 496, 118 P. 629 (1911). *But see* Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972).

45. Between 1927 and 1979 the doctrine was not challenged in the Nebraska Supreme Court. Interspousal tort immunity was the rule in the state without exception until the *Imig* decision was rendered.

46. This writer has yet to find an article or commentary that favors maintaining the de-

mately one-half of American jurisdictions.[47] The survival of the doctrine[48] is best explained by focusing on two basic premises that underlie its judicial interpretation: (1) the court's traditionally protective attitude toward the family unit, and (2) the court's perception of its own role in society.

Familial integrity and stability has been a cherished ideal in the English and American legal systems.[49] Any threat to the harmonious relation between husband and wife has ramifications potentially affecting children, property, estate, and society. The majority position in the United States has been that allowing interspousal tort liability will be disruptive of the peace and harmony of the family unit.[50] Courts are tacitly unwilling to take action that may increase the risk of separation, divorce, or annulment (demands on legal system) or create dependents not supported by the traditional breadwinner-husband (demands on the social system). A calculated appraisal of the burdens interspousal litigation could place on society may be a large part of the judicial reverence accorded the loving and harmonious family unit.[51] Add to this a strong policy of judicial nonintervention into the private relations between husband and wife and the grounds for judicial resistance to recognition of tort liability between the spouses are firmly established.

How a court perceives its role—as guardian, interpreter, or

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fense. Scholarly opinion maintains that the social and historical justifications for interspousal immunity are long past. *See, e.g.,* Farage, *Recovery for Torts Between Spouses*, 10 IND. L.J. 290, 302-03 (1934); Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife,* 15 MOD. L. REV. 133, 154 (1952); McCurdy, 4 VILL. L. REV. 303, *supra* note 12, at 337-38; McCurdy, 43 HARV. L. REV. 1030, *supra* note 12, at 1054-56; Comment, *New Interests in the Law of Torts,* 10 CAL. L. REV. 461, 480 (1922); Comment, *Tort Liability Within the Family Area,* 51 NW. U. L. REV. 610, 618-20 (1956); Comment, *Marital Disability in Personal Tort Actions,* 14 U. MIAMI L. REV. 99, 109 (1959); Note, *Husband and Wife - Interspousal Immunity,* 48 U. CINN. L. REV.120, 125 (1978). *See also*, W. PROSSER, *supra* note 33, at 863; RESTATEMENT (SECOND) OF TORTS § 895 F (1979).

47. Imig v. March, __ Neb. __, __, 279 N.W.2d 382, 384 (1979). *See generally* RESTATEMENT (SECOND) OF TORTS § 895 G, at 72-78 (Tent. Draft No. 18, 1972), for a listing of jurisdictions that have abrogated the interspousal immunity doctrine.

48. *See* Merenoff v. Merenoff, 76 N.J. 535, 542, 388 A.2d 951, 955 (1978).

49. 2 J. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 640, 770 (1968).

50. *See, e.g.,* Patterson v. Patterson, 129 N.J. Super. 524, 324 A.2d 111, 112-13 (1974), *overruled in,* Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978), in which the court stated,

> [T]his court is aware of the need for a sanctuary from the pressures and tensions of our modern world. Man must have a haven—some place where he can relax and lower his guard; some place where he is not held to an objective standard of reasonableness. It is to be hoped the reasonably prudent man will not treat his wife with the same aloof standard of conduct he, hopefully, accords his neighbor. Sanctuary has been one of the prime functions of the home in our society, and to require individuals to conform to a high degree of care in the privacy of their own homes would vitiate the reason for its existence.

51. Intentional tort and wrongful death actions have been the most frequent exceptions to the immunity defense, precisely because judicial intervention is not perceived as promoting personal conflict between spouses or burdening society. By *not* permitting these suits, however, society may pay additional legal and social costs through divorce or criminal action, or public support of dependents. *See* Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917) (intentional tort exception); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951) (wrongful death exception).

modifier/adapter of case and statutory law—will determine its position on interspousal tort immunity. These widely divergent functional views underlie the inconsistent and contradictory holdings in this area.[52] It was the *Imig* court's perceived view of its role as the responsible body for adapting law to meet the needs of modern society that led it to completely abrogate the doctrine.[53]

While judicial refusal to abolish the interspousal tort immunity doctrine has been soundly criticized,[54] courts willing to overturn the immunity defense have been met with charges of judicial usurpation of legislative authority.[55] The increasing number of courts that have abolished the doctrine view it as having originated in the common law, and therefore, within the ambit of judicial, rather than legislative, supervision.[56]

Perhaps the doctrine is best viewed as a hybrid of common-law theory, statutory impact, and judicial interpretation. State statutes regarding interspousal torts fall into three broad categories: (1) those statutes with specific provisions regulating interspousal liability;[57] (2) those statutes that do not mention tort claims, but permit other types of interspousal suits;[58] and (3) statutes that prohibit interspousal suits, but with certain limited exceptions.[59]

Considerations of time and character further delineate the application of the interspousal immunity doctrine. A personal tort be-

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52. *Compare* DiGirolamo v. Apanavage, 454 Pa. 557, 312 A.2d 382, 385 (1979), *with* Imig v. March, __ Neb. __, __, 279 N.W.2d 382, 385 (1979).

53. The court emphasized this role in the following passage:

> [J]udges of an earlier generation declared the immunity simply because they believed it to be a sound instrument of judicial policy which would further the moral, social and economic welfare of the people of the State. When judges of a later generation firmly reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs.

__ Neb. at __, 279 N.W.2d at 386 (quoting Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966)).

54. Thompson v. Thompson, 218 U.S. 611, 621 (1910) (Harlan, J., dissenting).

55. A unique situation in which a state legislature responded swiftly to a state court decision abrogating the immunity defense for negligent injuries between spouses occurred in Illinois in 1953. *See* note 29 *supra.*

Although the Nebraska Legislature has not been in session since *Imig v. March* was decided, it is unlikely that the decision will spark legislative reaction. The holding may be controversially broad, but the weight of public opinion and the trend toward abrogation of the defense in other states strongly support the court's position.

56. Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Rupert v. Steinne, 90 Neb. 397, 528 P.2d 1013 (1974); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (1973); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972).

57. ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd Supp. 1953); N.C. GEN. STAT. § 52-5 (1976); N.Y. GEN. OBLIG. LAW. § 3-313 (McKinney 1978); WIS. STAT. § 246.075 (1957). *See also* note 29 *supra.*

58. ARIZ. R. CIV. P. § 17(e) (1979); IND. CODE § 2-204 (Supp. 1955); NEB. REV. STAT. § 25-305 (1975); WASH. REV. CODE § 26.16.180 (Supp. 1955) (all construed as permitting some types of interspousal tort claims).

59. MASS. GEN. LAWS ANN. ch. 209, § 6 (West 1958); N.J. STAT. ANN. § 37:2-9 (West 1968); PA. STAT. ANN. tit. 48, § 111 (Purdon 1965) (statutes construed as permitting exceptions to the general rule prohibiting husband-wife tort claims).

tween husband and wife may occur before[60] or during[61] marriage, after legal separation,[62] or during an interlocutory period between marriage and divorce.[63] The suit may be brought after marriage for a tort committed during marriage.[64] The tort may be negligent[65] or intentional,[66] resulting in injury[67] or death.[68] There may be third-party involvement.[69] An insurance carrier[70] or employer[71] may affect the claim. The tort may have been the result of an automobile collision.[72] Whether the interspousal suit is litigated under the

60. Bohenek v. Niedzwiecki, 142 Conn. 278, 113 A.2d 509 (1955) (holding under applicable Pennsylvania law that a woman who married tortfeasor subsequent to car accident lost right to sue him for injuries arising from the accident); Amendola v. Amendola, __ Fla. Supp. __, 121 So. 2d 805 (1960) (wife's rights in tort against husband suspended during marriage); Packenham v. Miltimore, 89 Ill. App. 2d 452, 232 N.E.2d 42 (1967) (wife entitled to action against husband for antenuptial injuries sustained in auto accident allegedly caused by husband's wanton and wilful misconduct); Moulton v. Moulton, 309 A.2d 224 (Me. 1973) (husband liable for antenuptial injuries to wife).

61. Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (wife has cause of action against husband for injuries sustained from fall on slippery boat deck when husband negligently left water on the deck).

62. Arch v. Arch, 11 Md. App. 395, 274 A.2d 646 (1971) (immunity doctrine applies during legal separation).

63. Patterson v. Patterson, 129 N.J. Super. 524, 324 A.2d 111 (1974) (immunity in effect despite pending divorce).

64. Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974) (no cause of action after divorce for negligent tort committed during marriage); Ebel v. Ferguson, 478 S.W.2d 334 (Mo. 1972) (wife may not recover after divorce for wrongful act by husband during marriage). *But see* Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971) (spouse may recover damages after divorce for intentional tort committed during marriage).

65. Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978) (totally abrogated immunity doctrine for all tort actions on facts relating to negligent injuries); Lewis v. Lewis, 370 Mass. 1619, 351 N.E.2d 526 (1976) (wife allowed recovery for auto injuries due to husband's negligence; holding strictly limited to negligence in auto claims). *See* note 72 *infra.*

66. Lusby v. Lusby, __ Md. __, 390 A.2d 77 (1978) (wife recovers against husband for outrageous and intentional personal tort of forcible sexual intercourse).

67. *Id.*

68. *See* Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936) (both permitting wrongful death actions). *But see* Hovey v. Dolmage, 203 Iowa 231, 212 N.W. 553 (1927); Wilson v. Brown, 154 S.W. 322 (Tex. Civ. App. 1913); Keister's Adm'r. v. Keister's Ex'rs., 123 Va. 157, 96 S.E. 315 (1918).

69. Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960) (third-party derivative action against husband of decedent denied on grounds that husband was or might have been liable for auto accident causing wife's death and wife would have had no cause of action against husband had she lived). *Contra,* Shor v. Paoli, 353 So. 2d 825 (Fla. 1977); Pelowski v. Frederickson, 263 Minn. 371, 116 N.W.2d 701 (1962).

70. Harvey v. Harvey, 239 Mich. 142, __, 214 N.W. 305, 306 (1927); Perlman v. Brooklyn City R. Co., 117 Misc. 353, 191 N.Y.S. 891 (Sup. Ct. 1921); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971). *See also* Imig v. March, __ Neb. __, __, 279 N.W.2d 382, 387 (1979).

71. In states in which the immunity defense is viable, courts generally disavow suits against a spouse's employer based on negligence of the spouse as an ineffective attempt to circumvent the prohibition on interspousal suits. *See* note 38 *supra.*

72. Courts are divided as to whether recovery should be allowed in interspousal claims for auto injuries, although the trend is toward permitting recovery, particularly in cases in which there is an insurance carrier, wrongful death, or intentional or grossly negligent conduct. Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939). *Accord,* Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Digby v. Digby, __ R.I. __, 388 A.2d 1 (1978). *Contra,* Huebner v. Deuchle, 109 Ariz. 549, 514 P.2d 470 (1973); Policino v. Ehrlich, 478 Pa. 5, 385 A.2d 968 (1978). *See generally,* notes 94 and 95 and accompanying text *infra.*

wrongful death statute in the state, as *Imig* was,[73] or whether minor dependents survive the decedent[74] will all be factors weighing into the court's consideration of the acceptability of the case.

By the time *Imig v. March* was tried by the Nebraska Supreme Court, several states had already abolished the defense of interspousal immunity in wrongful death actions.[75] What distinguishes the Nebraska court ruling in *Imig* is not the novelty of the decision, but its breadth and the process used by the court to abrogate the doctrine after a long period of judicial inertia.

Imig v. March held that interspousal immunity was abolished in *all* tort actions, a far-reaching ruling many other courts would have avoided.[76] Wrongful death actions have been recognized by many states[77] as one of the exceptions to the immunity defense. The policy concerns of fraud and collusion between spouses and disruption of family harmony do not exist when one spouse is deceased.[78] Rather than treat the wrongful death claim as an exception to the interspousal immunity doctrine, the *Imig* court used the claim as an opportunity for abolishing the immunity defense in *all* interspousal tort cases.[79] The holding is remarkable for its brevity and scope.

Courts less bold have engaged in judicial cartwheels to reconcile the creation of a wrongful death exception while still retaining the doctrine for other tort actions. By only abrogating immunity for wrongful death suits, these courts permit the estate or personal representative of the decedent to have a cause of action that would have

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73. *See* Hull v. Silver, __ Utah __, 577 P.2d 103 (1978) (interspousal immunity doctrine abrogated in Utah under wrongful death statute). *Accord, In re* Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970). *See* note 75 and accompanying text *infra.*

74. Dependent minors present an equitable consideration in the court's appraisal of plaintiff's case. *In re* Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970).

75. Kentucky, Robinson's Adm'r v. Robinson, 188 Ky. 49, 220 S.W. 1074 (1920); Michigan, Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965); Minnesota, Poepping v. Lindemann, 268 Minn. 30, 127 N.W.2d 512 (1964); Pennsylvania, Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936); and Washington, Johnson v. Ottomeier, 45 Wash. 419, 275 P.2d 723 (1954), had already recognized a wrongful death exception.

76. The *Imig* decision appears to be unique in its approach to abrogation of the interspousal immunity doctrine. No other case has been found that completely strikes down the defense for all tort claims on the basis of a wrongful death action before the court.

77. *See, e.g.,* Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Herget Nat'l Bank of Pekin v. Berardi, 31 Ill. App. 3d 689, 335 N.E.2d 39 (1975); Deposit Guar. Bank & Trust v. Nelson, 212 Miss. 535, 54 So. 2d 476 (1951).

78. Johnson v. People's First Nat'l. Bank & Trust Co., 394 Pa. 116, 112, 145 A.2d 716, 719 (1958); Johnson v. Ottomeier, 45 Wash. 2d 419, 424, 275 P.2d 723, 725 (1954).

79. Compare the cautious approach of the Indiana Supreme Court in Brooks v. Robinson, 259 Ind. 16, __, 284 N.E.2d 794, 798 (1972), which preserved the immunity doctrine, but "subject to amendment, modification or abrogation by this court." Note also the piecemeal approach of the Washington Supreme Court in abrogating interspousal tort immunity: Schultz v. Christopher, 65 Wash. 496, 118 P. 629 (1911) (judicially established the doctrine in the state); Johnson v. Ottomeier, 45 Wash. 2d 419, 275 P.2d 723 (1954) (wrongful death exception to general rule); Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961) (intentional tort committed during legal separation another exception to rule); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972) (negligent tort actionable in interspousal suit).

been denied had the decedent survived.[80] To skirt this obvious inconsistency, other courts have described the immunity as purely personal and, therefore, terminating at the spouse's death.[81] This proposition enables the personal representative to maintain an action in his own right, somehow emanating from the person of the decedent, in fact a new action.[82] Other courts have described the wrongful death action as enunciated in the statutes as a drivative action based on the right of the decedent to maintain a cause of action had death not ensued.[83] To avoid the problem that decedent-spouse could not have brought a suit in life, the court will then interpret "derivative" to mean derived from the *injury* causing death, not derived from the person of the decedent.[84]

The *Imig* court dispenses with this legal hocus-pocus and forthrightly declares interspousal tort immunity to be completely abrogated and, therefore, a wrongful death action cannot be barred by the immunity defense.[85] *Imig v. March* provides sound reasoning in an area fraught with judicial inconsistency, blind rationalization, and a propensity to disguise policy predispositions in statutory interpretation.[86] Renouncing the rationale for maintaining the interspousal tort immunity doctrine, the court, quoting Professor Prosser, asserted that interspousal suits are a symptom and not a cause of family disharmony.[87]

> The chief reason relied upon by all these courts is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.[88]

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80. "A tortfeasor should not be under two different measures of obligation—one to the injured party and another to the heirs." Hull v. Silver, __ Utah, __, __, 577 P.2d 103, 107 (1978).

81. Mosier v. Carney, 376 Mich. 532, 562, 138 N.W.2d 343, 353 (1965).

82. *Id.* at 353, 138 N.W.2d at __; Hull v. Silver, __ Utah __, 577 P.2d 103, 105, 106 (1978).

83. Welch v. Davis, 410 Ill. 130, __, 101 N.E.2d 547, 548 (1951). *Contra,* Huebner v. Deuchle, 109 Ariz. 549, 514 P.2d 470 (1973) (denied a right of action in wrongful death by spouse's representative precisely on the grounds that it was a derivative action and thus, barred under the immunity doctrine).

84. Welch v. Davis, 410 Ill. 130, 135, 101 N.E.2d 547, 549 (1951); *In re* Pickens, 255 Ind. 119, __, 263 N.E.2d 151, 156 (1970).

85. Imig v. March, __ Neb. __, __, 279 N.W.2d 382, 386 (1979).

86. W. PROSSER, *supra* note 33, at 863.

87. Imig v. March, __ Neb. __, __, 279 N.W.2d 382, 385 (1979).

88. *Id.* at __, 279 N.W.2d at 384-85 (quoting W. PROSSER, *supra* note 33, at 863).

The court also rejected the traditional arguments based on concerns of fraudulent claims arising out of interspousal litigation and the availability of other remedies, which render tort claims between husband and wife unnecessary.[89] Instead, the court emphasized the responsibility of the judicial system to be open to injured parties seeking redress. The court asserted that the basic injustice of the interspousal immunity doctrine is that it renders a deserving plaintiff remediless while permitting a guilty defendant to escape punishment.[90] Like other forms of immunity, unless there is compelling justification, it offends the belief that a legal system should be open to all for the redress of grievances.

At the end of the 1970's, liability for interspousal tort is on the brink of becoming the majority rule in the United States.[91] Still, "[t]hese suits are now rejected in approximately one-half of the states."[92] Courts willing to partially abrogate the doctrine find it most indefensible in intentional torts,[93] wrongful death actions,[94] and auto claims.[95] The availability of insurance coverage is also an

89. Criminal and divorce actions are often cited as providing adequate remedy for the aggrieved spouse. Neither of these actions, however, is well-suited to providing damages for injury. Another difficulty is that negligent injury is not grounds for either action, and a wrongful death action would be precluded if criminal charges or divorce were the only available remedies. Allowing tort claims between spouses could potentially avert the need for a more drastic solution in the divorce or criminal courts.

90. The court analogized the injustice of interspousal tort immunity to the inequities of the governmental and charitable immunity doctrines, both of which had been earlier abrogated by the court. *Id.* at __, 279 N.W.2d at 385-86.

91. The trend toward abrogation of the defense has proceeded steadily in the twentieth century in spite of inconsistent and widely conflicting holdings from state to state. The earliest states to strike down the immunity and permit interspousal tort litigation were: Alabama (Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917)); Arkansas (Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832 (1916)); Connecticut (Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914)); and Oklahoma (Fiedeer v. Fiedeer, 42 Okla. 124, 140 P. 1022 (1914)). The list of jurisdictions to have abrogated the immunity doctrine for some or all interspousal torts is still growing. *See* note 47 and accompanying text *supra* for sources of jurisdictional listings.

92. Imig v. March, __ Neb. __, __, 279 N.W.2d 382, 384 (1979). For examples of the outrageous results possible by denying a cause of action on the grounds of interspousal immunity, see Wright v. Daniels, 164 N.W.2d 180 (Iowa 1969) (wife's estate denied recovery from husband convicted of wife's death); Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978) (damages awarded wife and minor children for auto collision reduced by percentage of fault attributable to husband as joint-tortfeasor); Donsbach v. Offield, 488 S.W.2d 494 (Tex. Civ. App. 1972) (reversal of damage award to children of mother shot to death by her second husband).

93. Lusby v. Lusby, __ Md. __, 390 A.2d 77 (1978); Flores v. Flores, 84 N.M. 600, 506 P.2d 345 (1973).

94. *See* notes 76-85 and accompanying text *supra.*

95. In a day when automobile accidents are unfortunately becoming so frequent and the injuries suffered by the passengers are often so severe, it seems unjust to deny the claims of the many because of the potentiality of fraud by the few. Moreover, there is something wanting in a system of justice which permits strangers, friends, relatives, and emancipated children to recover for injuries suffered as a result of their driver's negligence, but denies this right to the driver's spouse and minor children who are also passengers in the same vehicle.

Immer v. Risko, 56 N.J. 482, __, 267 A.2d 481, 488 (1970). *Accord,* Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Digby v. Digby, __ R.I. __, 388 A.2d 1 (1978). *See also* RESTATEMENT (SECOND) OF TORTS § 895F, Comment f, at 425-26 (1979).

important factor promoting the trend toward court acceptance of husband-wife tort suits.[96]

While an increasing number of states recognize that interspousal tort immunity is little more than a relic of a bygone era, the doctrine is still rigidly upheld in many jurisdictions, and injured parties are denied an appropriate remedy.[97] The Supreme Court of Nebraska, and other courts have taken a realistic view of contemporary needs[98] when refusing to condone the continued existence of a judicial procedure that makes the marital relation an obstacle to the orderly resolution of conflict. *Imig v. March* is a bold and positive thrust toward expanding individual rights and responsibilities, and in renewing the effectiveness and integrity of the court system. Courts in other states would do well to follow the example.

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96. The court in Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970) declared:

> Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage. The cost of making the injured spouse whole would necessarily come out of the family coffers, yet a tortfeasor spouse surely anticipates that he will be covered in the event that his negligence causes his spouse injuries. This unexpected drain on the family's financial resources could likely lead to an interference with the normal family life. And it is doubtful that this void in insurance coverage would comport with the reasonable expectations of the insured that this Court has so often sought to protect.

Id. at 489, 267 A.2d at 485.

97. *See* note 92 *supra.*

98. Some recent holdings, however, do not necessarily reflect progressive judicial thinking. *Compare* Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914), *with* Patterson v. Patterson, 129 N.J. Super. 524, 324 A.2d 111 (1974), *overruled by,* Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978). [Casenote by Carol F. Munson]